

NO. A-19-0993

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

KRISTEN K. YEUTTER,

Plaintiff/Appellee,

v.

JESSE D. BARBER,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
SARPY COUNTY, NEBRASKA

Honorable Nathan B. Cox, District Judge

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This is an appeal by Jesse D. Barber (hereinafter “Appellant”) from the Order issued by the District Court on September 18, 2019, after a trial was held in this matter on March 26, 2019. (T:67-77).

The Appellant appeals the Courts Order regarding the issues of child support and the issues of visitation by the Appellant with his minor child. The Appellant is presently incarcerated at the Nebraska Department of Corrections pursuant to his conviction and sentence imposed for First Degree Sexual Assault of a Child. (Trial Exhibits: 5,15 and 16).

The Notice Of Appeal by the Appellant was timely filed. This appeal is authorized by the Nebraska Constitution, Article I, Sec 23 and Neb. Rev. Stat. § 25-1912.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is a civil action initiated by the Appellant taking place in the Sarpy County District Court wherein the Appellant sought to modify a previous Order of the Court relative to paternity of the minor child herein. (T:1-6). The Appellee filed her Answer and a Cross Complaint also seeking to modify the previous Order (T:17-19).

Trial occurred in this case on March 26, 2019. Evidence was adduced through witnesses and exhibits to the Court. The Court issued its Order on September 19, 2019. (T:67-77). The Appellant now appeals.

B. ISSUES PRESENTED IN THE COURT BELOW.

The issues presented in the Court below were centered around the child support obligation of the Appellant for his minor child and the type of visitation to be allowed to

the Appellant with that minor child given his incarceration of a felony offense.

C. HOW THE ISSUES WERE DECIDED.

The District Court denied the Appellant's Complaint and awarded sole and permanent legal and physical custody of the minor child to the Appellee. The Court ordered the Appellant to pay child support in the amount of \$516.00 per month from August 1, 2017 to December 1, 2018. This coincided with the filing of the Cross Complaint by the Appellee to the time that the Appellant was sentenced for his felony conviction. This retroactive child support was ordered as a judgment, and is to remain a judgment, against the Appellant and to be paid to the Appellee. Additionally, taking into account the Appellant's incarceration the Court ordered the Appellant to pay the amount of \$50.00 per month beginning January 1, 2019. The Court also created a Parenting Plan addressing visitation and remediation. (T:67-77).

D. THE SCOPE OF REVIEW

The scope of review in a custody determination appeal is de novo on the record. The District Court Order and determinations will be affirmed absent an abuse of discretion. Tremain v. Tremain, 264 Neb. 328, 646 N.W. 2d 661 (2002).

PROPOSITIONS OF LAW

I.

There was no abuse of discretion as the District Court was well within its authority to rule as it did. Only where a decision is untenable and unfairly deprives a litigant of a substantial right or a just result will abuse of discretion be found. Neither occurred here.

Heistand v. Heistand, 267 Neb. 300, 673 N.W.2d 541 (2004)

II.

A material change in circumstances can be shown if the custodial parent is unfit or that the best interests of the child requires such action.

Tremain v. Tremain, 264 Neb. 328, 646 N.W.2d 661 (2002)

III.

The trial courts decisions will be affirmed absent an abuse of discretion.

Mamot v. Mamot, 283 Neb. 659, 813 N.W.2d 440 (2012)

IV.

The best interests of the child require a parenting arrangement, parenting plan or other court-ordered arrangement which provides for the child's safety, emotional growth, health, stability, and physical care.

Neb. Rev. Stat. 43-2923(1) (2010)

V.

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors: (d) Credible evidence of abuse inflicted on any family or household member

Neb. Rev. Stat. 43-2923(6)(d); 43-903 (2010)

VI.

Modification of child support payments is entrusted to the trial court's discretion and on appeal is reviewed de novo on the record and will be affirmed absent an abuse of discretion.

Freeman v. Groskopf, 286 Neb. 713, 838 N.W.2d 300 (2013)

VII.

A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results.

Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W. 2d 44 (2013)

VIII.

The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.

Incontro v. Jones, 277 Neb. 275, 761 N.W.2d 551 (2009)

IX.

Under certain conditions modification of a child support order may be made retroactive to the date of the filing of a complaint and will not be considered an abuse of discretion.

Maddux v. Maddux, 239 Neb. 239, 475 N.W.2d 524 (1991)

STATEMENT OF FACTS

This case commenced when the Appellant filed a Complaint to Modify an existing Court Order relating to the minor child he had with the Appellee. (T1-6). The Appellee filed her Answer and a Cross Complaint on July 24, 2017, seeking permanent sole legal and physical custody of the minor child and child support. (T:17-20).

Trial in this matter was to the Court on March 26, 2019. The Appellant's mother, Deanne Barber, was the sole witness in support of his Complaint. The Appellee testified in support of her Cross Complaint. The Appellant did not attend the hearing as he had been convicted in Dawes County, Nebraska of First Degree Sexual Assault of a Child, the Appellee's daughter, and had been sentenced on November 20, 2018 to 10-12 years in the Nebraska Department of Corrections. (Exhibits 5, 15 and 16 at trial; 34:3-13; 46:3-12; 69:6-10). Because of the nature of the conviction the Appellant is a Registered Sex Offender. (Ex. 17; 71:19-25).

The Appellant was working prior to his incarceration in November 2018 as a deck builder and making \$18.00 per hour. (40:22-25; 41:1-12). The Appellee testified that the Appellant made \$20.00 per hour. (74:10-20). During the course of the progression of this matter the Appellant supplied the Court an Affidavit dated July 19, 2017 concerning his income. (Ex. 20 at trial; 73:1-25; 74:1-25; 75:1-25; 76:1-20).

The Appellee testified that she was the sole provider for the minor child and that she had never received any child support from the Appellant. (53:10-24). The Appellee also covers all of the minor child's needs for daycare expenses since the incarceration of the Appellant. (55:1-4; 56:3-24). The Appellee earns approximately \$86,000 a year at her job as a nurse. (57:2-8). At the time the Cross Complaint was filed the Appellee was

earning \$66,000 per year (57:9-17) and that figure was used in the Retroactive Child Support Calculation. (Ex. A, Pg. 76 of Transcript; Ex. 14 at trial). The Appellant's total monthly income used was \$3,000. (58:2-4). The Appellee requested the Court award her monthly child support from August 1, 2017 to December 1, 2018 based upon the earnings of the parties during that time frame. (65:20-25; 66:1-7). The Appellant now earns \$30.00 per month in prison. (66:22-25; 67: 1). The Appellee is now responsible for the financial responsibilities of the minor child for the next 5-6 years because of the Appellants incarceration. (68:8-15).

The District Court having considered the matter issued its Opinion and Order on September 18, 2019. The Court found that the Appellant did not meet his burden in establishing a material change in circumstances. The Court did however find that the Appellee met her burden and did establish a material and substantial change in circumstances since the entry of the November 17, 2016 Decree. This material change was as a result of the Appellant being convicted of First Degree Sexual Assault and being sentenced to a term of incarceration for a term of 10-12 years. The Court found that the Appellee would be awarded permanent legal and physical custody of the minor child of the parties, that the Appellant be ordered to pay \$50.00 per month child support commencing January 1, 2019, the Appellant ordered to pay retroactive child support in the amount of \$516.00 per month from August 1, 2017 to December 1, 2018 and that the Appellee be awarded the state and federal tax exemptions for the minor child for tax year 2017 and to continue every year thereafter. The Court also established a Parenting Plan taking into account that the noncustodial parent (Appellant) is in the Nebraska Department of Corrections for the next 5-6 years. The Court noted that the Parenting Plan

was created pursuant to the requirements of the Nebraska Parenting Act. The Court additionally found that the Appellant was not an unfit or improper person to be involved in the parenting of the minor child, but due to his incarceration it is uncertain of the Appellant's ability or willingness to be actively involved. Because of the realities of the situation the Court set forth what it termed a "general parenting plan". A remediation section was included to assist in the event the noncustodial parent becomes actively involved with the minor child in the future. The Court also included two (2) child support calculations consistent with the Opinion and Order. (T:67-77).

SUMMARY OF THE ARGUMENT

I. The District Court did not err in finding a material change in circumstances and to order the Appellant to pay both retroactive child support and child support while he is incarcerated.

II. The District Court did not err in its creation of the Parenting Plan given the incarceration of the Appellant.

ARGUMENT

I. THE ORDER OF THE DISTRICT COURT WAS NOT AN ABUSE OF DISCRETION AS IT RELATES TO MATTERS OF CHILD SUPPORT

An Appellate Court will not disturb an Order of the District Court unless the Court has abused its discretion. Tremain v. Tremain, 264 Neb. 328, 646 N.W. 2d, 661 (2002); Mamot v. Mamot, 283 Neb. 659, 813 N.W.2d 440 (2012). An abuse of discretion

takes place when the Court's reasons or rulings are untenable and unfairly deprive the Appellant of a substantial right and a just result. Heistand v. Heistand, 267 Neb. 300, 673 N.W. 2d 541 (2004).

A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results. Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W.2d 44 (2013).

Furthermore, modification of child support payments is entrusted to the trial court's discretion and on appeal is reviewed de novo on the record and will be affirmed absent an abuse of discretion. Freeman v. Groskopf, 286 Neb. 713, 838 N.W. 2d 300 (2013).

The Appellant's mother, Deanne Barber, was the sole witness in support of his Complaint. The Appellee testified in support of her Cross-Complaint. The Appellant did not attend the hearing as he had been convicted in Dawes County, Nebraska of First Degree Sexual Assault of a Child of the Appellee's daughter and had been sentenced on November 20, 2018 to 10-12 years to the Nebraska Department of Corrections. (Exhibits 5, 15 and 16 at trial; 34:3-13; 46:3-12; 69:6-10). Because of the nature of the conviction the Appellant is a Registered Sex Offender. (Ex. 17; 71:19-25).

The Appellant was working prior to his incarceration in November 2018 as a deck builder and making \$18.00 per hour. (40:22-25; 41:1-12). The Appellee testified that the Appellant made \$20.00 per hour. (74:10-20). During the course of the progression of this matter the Appellant supplied the Court an Affidavit dated July 19, 2017 concerning his income. (Ex. 20 at trial; 73:1-25; 74:1-25; 75:1-25; 76:1-20).

The Appellee testified that she was the sole provider for the minor child and that she had never received any child support from the Appellant. (53:10-24). The Appellee also covers all of the minor child's needs for daycare expenses since the incarceration of the Appellant. (55:1-4; 56:3-24). The Appellee earns approximately \$86,000 a year at her job as a nurse. (57:2-8). At the time the Cross-Complaint was filed the Appellee was earning \$66,000 per year (57:9-17) and that figure was used in the Retroactive Child Support Calculation. (Ex. A, Pg. 76 of Transcript; Ex. 14 at trial). The Appellant's total monthly income used was \$3,000. (58:2-4). The Appellee requested the Court award her monthly child support from August 1, 2017 to December 1, 2018 based upon the earnings of the parties during that time frame. (65:20-25; 66:1-7). The Appellant now earns \$30.00 per month in prison. (66:22-25; 67: 1). The Appellee is now responsible for the financial responsibilities of the minor child for the next 5-6 years because of the Appellants incarceration. (68:8-15). The Appellee requested child support in her Cross Complaint filed July 24, 2017. (T:17-19).

At trial both the Appellant's mother and the Appellee testified concerning the work history and the earning capacity of the Appellant. Not only that, but the District Court had Exhibit 20, the Affidavit signed by the Appellant under oath, attesting as to the monthly amount he earned. The Court had ample evidence to justify the findings in its Opinion and Order. (T:67-77). The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child. Incontro v. Jones, 277 Neb. 275, 761 N.W. 2d 551 (2009). The Nebraska Supreme Court has held that under certain conditions modification of child support may be made

retroactive to the date of the filing of a Complaint and will not be considered an abuse of discretion. Maddux v. Maddux, 239 Neb. 239, 475 N.W.2d 524 (1991).

The comment by the Appellant that the report of his criminal activities were only made by the Appellee and her daughter after the Appellant had filed his custody suit are utterly without merit and not factually correct (Appellant's Brief, Pg. 12). Additionally, counsel now gratuitously, with no evidence to support such comment and no trial testimony, inserts that comment into his brief to somehow suggest this criminal reporting by Appellee's daughter was only in response to a lawsuit.

The Appellant's argument that both parties were required to annually exchange W-2s, 1099's and K-1's along with federal tax returns is disingenuous and of no consequence. The Appellant fully knows that the parties were residing together in November of 2017 at the time of the Decree. Also, the Appellee provided, through discovery, her income information in 2018 as a part of this process. This argument is only a red herring as it neither adds nor detracts any issue that was to be determined by the District Court. Neither party offered any evidence of such at trial, but to now argue that it did not occur is simply inaccurate. The District Court applied the law to the facts of the case and clearly did not abuse its discretion when it ordered child support from the time of the filing of the Cross Complaint until the incarceration of the Appellant. The Court also did not abuse its discretion when it ordered the Appellant to pay \$50.00 per month after his incarceration. Clearly, the Court took into consideration the incarceration of the Appellant when it ordered him to only pay \$50.00 per month commencing January 1, 2019.

The Appellant's reliance on Rouse v. Rouse, 775 N.W.2d 457, 18 Neb. App. 128 (2009), and Hopkins v. Stauffer, 775 N.W.2d 462, 18 Neb. App. 116 (2009) is misplaced. In both of those cases inmates filed complaints to modify child support obligations, long imposed, because of their incarceration. In the instant action, with Court pleadings dating back to mid 2017, the Appellee requested child support from the Appellant in her Cross Complaint. The case did not go to trial until March of 2019 with an Opinion and Order filed in September of 2019. Again, the District Court, taking into consideration the incarceration of the Appellant only ordered him to pay the minimum amount of \$50.00 per month. The \$516 ordered by the Court was from the filing of the Cross Complaint to the time the Appellant was incarcerated for his misdeeds. The District Court completely took into account the incarceration of the Appellant when it allowed a support reduction by only ordering him to pay \$50.00 per month. The District Court exercised sound discretion when it considered the Appellant's incarceration and determined that a child support reduction was appropriate while the Appellant was in prison.

II. THE DISTRICT COURT DID NOT ERR IN IT'S CREATION OF THE PARENTING PLAN GIVEN THE INCARCERATION OF THE APPELLANT, NOR DID IT ABUSE IT'S DISCRETION.

The District Court did not abuse its discretion in creating it's Parenting Plan. Rather, it exercised sound logic and reasoning given the facts and circumstances of the case. Complete discretion to the Appellee was prudent and necessary as the Appellant was in prison for sexually assaulting the minor daughter of the Appellee. It could not have been otherwise. The Appellant dislikes mediation, but yet gives no support that any

mediation could not occur. With letters, phone interviews and perhaps even video availability mediation could occur if needed and required. There is no proof to suggest that mediation (if needed) is not available to the Appellant due to his incarceration.

The Court in establishing a Parenting Plan took into account that the noncustodial parent (Appellant) is in the Nebraska Department of Corrections for the next 5-6 years. The Court noted that the Parenting Plan was created pursuant to the requirements of the Nebraska Parenting Act. The Court additionally found that the Appellant was not an unfit or improper person to be involved in the parenting of the minor child, but due to his incarceration it is uncertain of the Appellant's ability or willingness to be actively involved. Because of realities of the situation the Court set forth what it termed a "general parenting plan". A remediation section was included to assist in the event the noncustodial parent becomes actively involved with the minor child in the future. Opinion and Order. (T:67-77).

The Appellant's reliance on Casper v. Casper, 198 Neb. 615, 254 N.W. 2d 407 (1977) is also misplaced. The Nebraska Supreme Court in *Casper* found that the trial court did not abuse its discretion in limiting visitations of the father who was incarcerated.

Neb. Rev. Stat. 43-2923(1) instructs us that the best interests of the child require a parenting arrangement, parenting plan or other court-ordered arrangement which provides for the child's safety, emotional growth, health, stability and physical care. Neb. Rev. Stat. 43-2923(6)(d) and 43-903 provide that in determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following factors: (d) Credible

evidence of abuse inflicted on any family or household member. The Appellant was convicted and sentenced for sexually assaulting the minor child's stepsister when she was 17 years old. The facts of this case dictated that a Parenting Plan as created by the Court was prudent, reasonable and necessary. There was no abuse of discretion by the District Court.

CONCLUSION

For the foregoing reasons, the Appellee requests that this Court affirm the District Court's Order, Parenting Plan and child support determination in all respects. There was no abuse of discretion in any aspect of the District Court's determinations.

RESPECTFULLY SUBMITTED,

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Plaintiff/Appellee,)	
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vs.)	CERTIFICATE OF SERVICE
)	
JESSE D. BARBER,)	
)	
Defendant/Appellant.)	

This is to certify that I efiled the Appellee's brief with the State of Nebraska with service by email to the Defendants attorney, Matthew S. Higgins, Omaha, NE 68109, this 13th day of April, 2020.

KRISTEN K. YEUTTER, Appellee

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Certificate of Service

I hereby certify that on Tuesday, April 14, 2020 I provided a true and correct copy of this *Brief of Appellee Yeutter* to the following:

Jesse D Barber represented by Matthew Stuart Higgins (20081) service method: Electronic Service to **higgins@matthigginslaw.com**

Signature: /s/ Donald L. Schense (16928)